No. 16050

United States Court of Appeals

For the Ninth Circuit

McNEIL CONSTRUCTION COMPANY,
a corporation,

Appellant,

v.

THE LIVINGSTON STATE BANK,
a corporation,

Appellee.

Appellant's Reply Brief

Appeal from the United States District Court for the District of Montana.

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Appellant's Reply Brief

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In this Reply Brief we shall consider the arguments of the appellee in the same order as discussed in the Appellee's Brief.

I.

Beginning on page 4 of Appellee's Brief, the argument is made that this Court cannot review the decision of Judge Murray granting defendant a conditional summary judgment because by amending plaintiff has "voluntarily" acquiesced in that order.

The answer to this position is twofold. First, by filing an amended complaint, we did not acquiesce in the Court's ruling denying the plaintiff's application for summary judgment. Therefore, this Court has full power to review that portion of Judge Murray's decision which denied plaintiff's application for summary judgment on undisputed facts. Second, as the authorities cited by the defendant show, the acquiescence must be voluntary before the rule is invoked, and each case must be decided on its own facts. A review of the facts confronting this Court on this question will, we submit, convince this Court that the acquiescence was involuntary in the case at bar.

At the time the motion was first argued before Judge Murray, Judge Jameson had theretofore denied the defendant's motion to dismiss the complaint on the ground that it did not state a claim for which relief can be granted. Despite this fact, Judge Murray granted the defendant a conditional summary judgment on the ground that the complaint did not state a claim for which relief could be granted, even though the missing elements, which Judge Murray thought should be pleaded, appeared in affidavits submitted in support of plaintiff's motion for summary judgment. Judge Murray recognized the fact that Judge Jameson's decision had precluded him from dismissing the complaint on the ground that it did not state facts for which relief could be granted, so in the alternative he granted the defendant a conditional summary judgment, which, as pointed out in our

first brief, is not authorized by any rule of civil procedure or by any case that we have been able to find. The effect, however, of the order granting defendant conditional summary judgment, as pointed out in our principal brief, was to decide the case on the merits and thus preclude not only McNeil from again filing suit, but also the Seaboard Surety Company. *Celanese Corporation v. John Clark Industries,* 214 Fed. 2d 551 (C. A. 5th 1954). Not only that, but summary judgment was granted to the defendant even though no such application had been made by the defendant.

Under these circumstances, plaintiff could not risk the entry of a judgment and thus test the validity of the Court's conclusion that the loan made by Seaboard to McNeil was in fact payment. Under these circumstances, it could hardly be argued that plaintiff's amended complaint constituted voluntary acquiescence in the Court's ruling. For that reason we respectfully submit that the first argument advanced by the appellee is without substance either in law or in fact. In any event, it does not preclude reviewing the denial of plaintiff's motion for summary judgment.

II.

The second argument advanced by the appellee is that this Court should defer to the trial judge's interpretation of Montana law. Recently this Court considered this argument in *Bower v. Bower,* 255 Fed. 2d 618 (C. A. 9th 1958), when it said:

"This court is inclined to the belief that the Mon-

> tana Supreme Court would hold here as the district court did. Moreover, this court before it overrules any district judge on a matter of his state law should have a conviction that the district court was clearly wrong."

We believe that the authorities cited by us in our primary brief compel the conclusion that the District Court was clearly wrong in the case at bar. Moreover, the Montana case of *Rae v. Cameron,* 114 Pac. 2d 1060, 112 Mont. 159, which is cited on page 20 of our brief, clearly indicates that probably the Montana Supreme Court would sustain the validity of loan receipts and would permit McNeil to maintain this suit in the case at bar.

III.

The remaining portion of the defendant's brief relates to problems which we feel have been adequately briefed in the primary brief heretofore submitted by us. We feel it would be unduly burdensome for us to again repeat the arguments we have made there. We refer the Court to our primary brief as an answer to the remaining problems discussed by the appellee in its brief.

One thing, however, should be mentioned. The loan made by Seaboard to McNeil was for the exact amount of the loss and did not include any interest to which McNeil was entitled. In McNeil's complaint it not only seeks to recover the amount of the loss, but also interest from November 1, 1956. Aside from the fact that both Seaboard and McNeil designated the transaction as a loan, the intent of the parties to consider it a loan is made

manifest by McNeil's application for interest from November 1, 1956. The appellee's attempt to limit the decision of the Supreme Court of the United States in *Luckenbach v. W. J. McCahan Sugar Refining Company,* 248 U. S. 139, does not take into account the further development of the doctrine of loan receipts by other courts since the decision in the Luckenbach case in 1918. As the cases hold, there are equitable and commercial reasons for developing this doctrine. For example, in the case at bar McNeil could have in its discretion looked solely to the Livingston State Bank and its bonding company for payment of the loss, which would have involved delay and conceivable hardship. By relying upon loan receipts, McNeil could immediately obtain the use of the amount of the loss and still proceed against the defendant to recover interest for the period of time it was deprived of the use of this money.

Under the circumstances presented here, we respectfully submit that not only should the decision of the District Court be reversed, but that plaintiff should be granted summary judgment on the undisputed facts.

Respectfully submitted,

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By Weymouth D. Symmes, of Counsel